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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MANORI DUSHANTHI SAMARAKONE,<br><br>Defendant and Appellant. | G055406<br><br>(Super. Ct. No. 16HF1261)<br><br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Michael A. Leversen, Judge. Affirmed as modified.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Manori Dushanthi Samarakone of attempting to record a false or forged instrument and disobeying a court order. At sentencing, the trial court imposed various conditions of probation, including that Samarakone must not "associate with persons known to [her] to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, *or otherwise disapproved of by probation or mandatory supervision*." (Italics added.) Samarakone challenges the italicized portion of the probation condition on appeal, asserting it is unconstitutionally overbroad. We agree and modify the judgment accordingly. As modified, the judgment is affirmed.

## I.

## FACTS

Samarakone lost her home in a 2007 foreclosure. Shortly thereafter, Amy and Mourad Lichaa bought the property and moved in.

Samarakone was unwilling to accept that she no longer owned the property, believing that she still owned it and that she had been "locked out of [her] house by a stranger." According to the Lichaas, in the years that followed, Samarakone visited the property a number of times, called the Lichaas on the telephone, and had her mail delivered to the property. The Lichaas also discovered that various bills, including telephone and utility bills, had been put in Samarakone's name.

In 2015, the Lichaas obtained a restraining order against Samarakone. The court ordered Samarakone to stay away from the residence and not communicate with the Lichaas. Nevertheless, the Lichaas observed Samarakone outside their home in 2016, and they continued to receive mail addressed to Samarakone.

In 2016, Samarakone admitted to investigators she executed, notorized, and recorded a grant deed showing she owned the property.

A jury convicted Samarakone of attempting to record a false or forged instrument (Pen. Code, § 115, subd. (a)) and disobeying a court order (Pen. Code, § 166,

subd. (a)(4)). At sentencing, the trial court suspended imposition of a three-year prison term on the first count, placed Samarakone on a five-year term of supervised probation, and imposed a concurrent term of 180 days on the second count, with credit for time served. Samarakone appealed.

## II.

## DISCUSSION

The probation conditions imposed by the trial court included the following restrictions on association: "Do not associate with persons known to you to be parolees, on post-release community supervision, convicted felons, users or sellers of illegal drugs, *or otherwise disapproved of by probation or mandatory supervision.*" (Italics added.)

Samarakone contends the italicized portion of the probation condition is unconstitutionally vague and overbroad because it places no limits on those persons with whom the probation officer may prohibit Samarakone from associating and gives the probation officer unfettered discretion to decide with whom she may associate. Reviewing this constitutional challenge de novo (see *People v. Arevalo* (2018) 19 Cal.App.5th 652, 656), we agree.

At the outset, we must address the Attorney General's contention that Samarakone forfeited her challenge to the probation condition by failing to object in the trial court. Generally speaking, failure to timely challenge a probation condition in the lower court forfeits the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 230.) But a challenge to a probation condition as facially vague and overbroad may be raised for the first time on appeal if it presents a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*).) Because Samarakone challenges the probation condition only on its face, she did not forfeit her claim that the probation condition is unconstitutionally overbroad.

Turning to the merits of Samarakone's argument, "[t]rial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect

public safety pursuant to Penal Code section 1203.1.' [Citations.] If it serves these dual purposes, the condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) Thus, "[c]onditions of probation prohibiting an individual from associating with other persons including spouses and close relatives, who have been involved in criminal activity have generally been upheld when reasonably related to rehabilitation or reducing future criminality." (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 367.)

A probation condition is unconstitutionally overbroad, however, if it places no limits on the persons with whom the probation officer may prohibit the probationer from associating. *People v. O'Neil* (2008) 165 Cal.App.4th 1351 (*O'Neil*) is instructive on this point. In *O'Neil*, one of the probation conditions required the defendant "'not [to] associate socially, nor be present at any time, at any place, public or private, with any person, as designated by [his] probation officer.'" (*Id.* at p. 1354.) The Court of Appeal concluded this probation condition was an "unconstitutional infringement on defendant's right of association" because it failed to "identify the class of persons with whom defendant may not associate" or "provide any guideline as to those with whom the probation department may forbid association." (*Id.* at pp. 1357-1358.) "As written, there [were] no limits" on the probation officer's discretion. (*Id.* at p. 1357.)

The *O'Neil* court went on to hold that a trial court's delegation of authority to the probation department should not be "entirely open-ended." (*O'Neil*, *supra*, 165 Cal.App.4th at p. 1359.) Although "[t]he court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation," it is the *court*, not the probation officer, that must determine "the class of people with whom the defendant is directed to have no association." (*Id.* at pp. 1358-1359.) The class of individuals falling within the condition "should not be left to implication.'" (*Id.* at p. 1358.) "Without a meaningful standard,

the order [was] too broad and [could] not [be] saved by permitting the probation department to provide the necessary specificity." (*Ibid*.)

Here, the portion of the probation condition that prohibits Samarakone from associating with persons "otherwise disapproved of by probation or mandatory supervision" suffers from the same flaw as the one held invalid in *O'Neil*. It impinges upon Samarakone's constitutional right to associate and gives too much discretionary control to the probation officer. Like the flawed condition in *O'Neil*, it fails to specify a class of persons with whom Samarakone may not associate, nor does it place any limits on the probation officer's authority to prohibit persons Samarakone from legitimate and law-abiding associations. Indeed, it is bereft of *any* standard to guide the officer in its implementation. It thus amounts to an unconstitutional infringement on Samarakone's right of association.

The Attorney General argues the probation condition is not in fact "open-ended" because the other language in the condition provides guidance to the probation officer on the general class of people with whom Samarakone is not to associate — namely, parolees, convicted felons, and users or sellers of illegal drugs. From this, the Attorney General extrapolates that the probation officer may only restrict Samarakone from associating with those persons who appear reasonably likely to be detrimental to her reformation and rehabilitation. We do not find this argument persuasive. On its face, the condition does not suggest there is any connection between the enumerated persons with whom Samarakone is prohibited from associating and those persons designated by her probation officer. Instead, the condition appears to create two separate categories of prohibited persons: those expressly enumerated and those "otherwise disapproved of" by probation. We fail to see how Samarakone's probation officer — or, for that matter, Samarakone — would gather that the first group somehow relates to or limits the second group.

The Attorney General also argues the condition is permissible because it is narrowly tailored to the compelling state interests of rehabilitation and public protection. (See *In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 [probation condition is unconstitutionally overbroad if it impinges on constitutional rights and is not narrowly tailored to compelling state interest in reformation and rehabilitation].) We do not see how the language in question is narrowly tailored to such interests. Instead, the challenged portion of the probation condition gives the probation officer complete and unfettered discretion to restrict Samarakone's contact with anyone "otherwise disapproved of by probation or mandatory supervision." That is not "narrowly tailored" to any particular interest. (*Id.* at p. 1155.)

Finally, the Attorney General argues the delegation of discretion to the probation officer is permissible under Penal Code section 1202.8, subdivision (a), which allows the probation officer to "determine both the level and type of supervision consistent with the court-ordered conditions of probation." The Attorney General further argues the probation officer's discretion is implicitly limited by a reasonableness requirement. (See *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240 [courts lack power to impose unreasonable probation conditions and cannot give that authority to probation officer].) Section 1202.8 is unavailing here because the condition in question gave absolutely no guidance to the probation officer and thus was unconstitutionally overbroad. And even if a particular probation officer exercises his or her authority in a reasonable manner, the unlimited delegation of authority to the probation officer in the first instance is improper.

The probation condition in this case, unlike the condition at issue in *O'Neil*, identifies certain categories of persons with whom Samarakone may not associate ("persons known to you to be parolees, on post-release community supervision, convicted felons, [or] users or sellers of illegal drugs"). The probation condition thus can be made constitutional without rewriting it by striking the challenged phrase "or otherwise

disapproved of by probation or mandatory supervision." We therefore exercise our authority to modify the probation condition and delete the offending clause. (*Sheena K., supra,* 40 Cal.4th at p. 892 [appellate courts have power to modify probation term on appeal].)

## III.

## DISPOSITION

The probation condition is modified to read: "Do not associate with persons known to you to be parolees, on postrelease community supervision, convicted felons, or users or sellers of illegal drugs." The judgment is affirmed as modified.

ARONSON, P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.